Supreme Court, U.S.
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In The
Supreme Court of the United States

October Term 1997

SHARON MARIE PLAIN,
Petitioner,

v.

SEARS ROEBUCK AND COMPANY; SEARS STORE 2755,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petition for Writ of Certiorari

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18 pp

QUESTIONS PRESENTED

1. Whether Ms. Plain should have filed a separate administrative charge with the Equal Employment Opportunity Commission (EEOC) prior to instituting her suit on the issue of discriminatory termination when she alleged systemic violations committed by Sears.

2. Whether Ms. Plain filed a timely administrative charge of discrimination challenging the alleged denials of accommodation, harassment and promotion when she alleged a systemic violation in these areas by Sears and when she sought the EEOC's assistance as early as 1992.

3. Whether the court below erred when it adopted Sears' reasoning and ruled that Ms. Plain was not a qualified individual with a disability under the Americans with Disabilities Act when she alleged widespread discriminatory systemic violations.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

STATEMENT OF THE CASE 1

REASONS FOR GRANTING THE WRIT 4

I. THE COURT BELOW ERRED WHEN IT ADOPTED SEARS' REASONING AND DISMISSED MS. PLAIN'S MATTER BECAUSE MS. PLAIN DID NOT FILE A SEPARATE ADMINISTRATIVE CHARGE PRIOR TO INSTITUTING SUIT ON THE ISSUE OF TERMINATION 4

II. THE COURT BELOW ERRED WHEN IT ADOPTED SEARS' REASONING AND RULED THAT MS. PLAIN DID NOT FILE A TIMELY ADMINISTRATIVE CHARGE OF DISCRIMINATION CHALLENGING THE ALLEGED DENIALS OF ACCOMMODATION, HARASSMENT AND PROMOTION 6

III. THE COURT BELOW ERRED WHEN IT ADOPTED SEARS' REASONING AND RULED THAT MS. PLAIN WAS NOT A QUALIFIED INDIVIDUAL WITH A DISABILITY UNDER THE AMERICANS WITH DISABILITIES ACT 11

CONCLUSION 12

TABLE OF AUTHORITIES

Cases: Page

Butts v. City Department of Houston,
990 F.2d 1397 (2nd Cir. 1993) 5

Choate v. Caterpillar Tractor Co.,
402 F.2d 357 (7th Cir. 1968) 7

Chung v. Pomona Valley Community Hospital,
667 F.2d 788 (9th Cir. 1982) 5

Daines v. City of Mankato,
754 F.Supp. 681 (D. Minn. 1990) 6

Gamble v. Birmingham Southern Railway,
514 F.2d 678 (5th Cir. 1975) 5, 6

Gupta v. East Texas State University,
654 F.2d 411 (5th Cir. 1981) 5

Hughes v. Derwinski,
967 F.2d 1168 (7th Cir. 1992) 5

Oubichon v. North American Rockwell Corp.,
482 F.2d 569 (9th Cir. 1973) 5

Price v. Southwestern Bell Tel. Co.,
687 F.2d 74 (5th Cir. 1982) 8

Reed v. Lockheed Aircraft Corporation,
613 F.2d 757 (9th Cir. 1980) 8, 9

Russell v. American Tobacco Co.,
528 F.2d 357 (4th Cir. 1975) 7, 8

Stallworth v. Monsanto,
13 FEP 826 (N.D.Fla. 1975).....7

Waiters v. Parsons,
729 F.2d 233 (3rd Cir. 1984).....5

Weeks v. Southern Bell Tel. & Tel. Co.,
408 F.2d 228 (5th Cir. 1969).....7

Wyrick v. TWA Credit Union,
804 F.Supp. 1176 (W.D. Mo. 1992).....5

Statutes:

Title VII of the Civil Rights Act of 1964, as amended,
42 USC Section 2000e.....3, 4, 8, 9

Americans With Disabilities Act of 1990, as amended,
42 USC Section 12101, et. seq. 2, 3, 8, 9

Regulations:

29 CFR Section 1601.12(b).....8, 10

Rules:

Federal Rules of Civil Procedure,
Rule 12(b)(6) 3

Treatises:

EEOC Compliance Manual, Section 605.1 .....passim

The petitioner, Sharon M. Plain, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in her case on 15 December 1997.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is unpublished. (Appendix) The order of the United States District Court for the Eastern District of North Carolina is unpublished. (Appendix)

JURISDICTION

The final opinion of the United States Court of Appeals for the Fourth Circuit was entered on 15 December 1997. The jurisdiction of this Court is invoked under 28 USC § (Supp 199).

STATEMENT OF THE CASE

Sharon M. Plain was hired in 1983 by Sears & Roebouck to work as a sales clerk for their Jacksonville, NC, store in the "Lawn-n-Garden" section. (App. 16, 90) Two years later she began to notice some numbness in her feet and legs while she worked. (App 56) Ms. Plain was diagnosed as having transverse myelitis and pernicious anemia, and so informed Sears. (App. 87) Ms. Plain reminded them of this diagnosis in 1988 and in 1989 when she was offered a supervisory position as a Sales Supervisor in "Lawn-n-Garden" and the "Hardware" department. (App. 87, 56) In the meantime, Ms. Plain's health had deteriorated and she again sought medical treatment. In November of 1991 she was rediagnosed as having multiple sclerosis, and again, she immediately informed her employer of the change through her

supervisor. (App. 87)

Despite her profitable and successful work history at Sears, shortly after her diagnosis Ms. Plain noticed that she was being treated differently. (App. 89-90) When she needed to take off time for medical treatments she was ridiculed and harassed by her superiors. (App. 89) When she asked about being promoted to open positions, she was told officially that they were not open. Unofficially, she was told that the store manager did not see how she could perform in those positions with her disability. (App. 89-90)

Specifically, Ms. Plain alleged that on March 2, 1992, Mr. David Parker, Sales Manager, harassed her when he made fun of Plaintiff's multiple sclerosis conduct and when he allowed other people to make fun of Plaintiff. (App. 9) Ms. Plain also alleged that on August 10, 1993, Mr. Doug Turner, Store Manager, announced at a meeting with other employees that Ms. Plain would not be placed on a staff schedule due to her health and her doctor's recommendations. (App. 9) Additionally, Ms. Plain indicates that she was never given an opportunity to be nor was given any reasonable accommodation. (App. 9).

Ms. Plain filed several EEOC charges of discrimination dating back to 1992 which allege discrimination in her employment. (App. 99-100) She communicated with and was assured by the EEOC that her allegations were being in some way handled. She sought help from the EEOC as far back as 1992 and was not given such help until she filed a charge with the EEOC dated January 9, 1995 (App. 100) at which time the EEOC began its inquiry. In that charge, she alleged the 1992 and 1993 filings with the EEOC and included allegations of systemic discrimination. (App. 100) When there was no resolution, Ms. Plain was given a Right To Sue letter.

On December 22, 1995, Ms. Plain, a *pro se* litigant, filed a complaint in the United States District Court for the Eastern District of North Carolina alleging that Sears discriminated against her because she is a qualified disabled

individual within the meaning of the Americans with Disabilities Act of 1990, as amended, 42 U. S. C. Section 12101, et seq (hereinafter referred to as "ADA"). Additionally, Ms. Plain alleged that due to her sex (female) Sears had discriminated against her in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. Section 2000e, et seq. (hereinafter referred to as "Title VII"). Without the benefit of any discovery on her part, on February 1, 1996, Sears filed its motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. (App. 13) On 6 March 1996, Ms. Plain filed what purports to be a memorandum opposing Sears' Motion To Dismiss raising as many issues as possible in light of no discovery order. (App. 85) On March 22, 1996 Sears filed its reply to Ms. Plain's Memorandum. (App. 126)

On March 27, 1996, United States District Judge James C. Fox allowed Sears' Motion, dismissed the matter and directed the clerk of court to enter judgment for Sears. (App. 146) In support of his order, Judge Fox adopted the reasons set forth in Sears' Memorandum in Support of its Motion To Dismiss and in Sears' Reply to Ms. Plain's Response. (App. 146) This was the final decision of the United States District Court. On December 15, 1997, the United States Court of Appeals for the Fourth Circuit held that Ms. Plain's filing to the EEOC in February of 1995 was the only relevant evidence of filing and that it was untimely. They also held that the other issues were not of merit and affirmed the order dismissing the case.

REASONS FOR GRANTING THIS WRIT

I. THE COURT BELOW ERRED WHEN IT ADOPTED SEARS' REASONING AND DISMISSED MS. PLAIN'S MATTER BECAUSE MS. PLAIN DID NOT FILE A SEPARATE ADMINISTRATIVE CHARGE PRIOR TO INSTITUTING SUIT ON THE ISSUE OF TERMINATION

In granting Sears' motion to dismiss, the Courts below accepted the argument that the Ms. Plain "failed to satisfy administrative prerequisites to filing a private suit under each of the" Americans with Disabilities Act and Title VII of the Civil Rights Act of 1964 because she did not specifically invoke them as separate legal issues with regard to the termination. While there is provision to do so within these laws, to find the plaintiff's *pro se* submissions wanting and rule dispositively against her on this basis is simply not supported by the law.

First and foremost, it must be noted that Ms. Plain was not required to file a separate administrative charge of discrimination challenging her termination under the Americans with Disabilities Act of 1990, as amended, 42 U.S.C. Section 12101, et seq. or Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. Section 2000e, et seq. In her pleadings, Ms. Plain has raised the issue of her termination. She alleges that her termination resulted from Sears' failure to accommodate her. The failure to accommodate issue was raised in Ms. Plain's 1992 and 1993 communications with the EEOC. In her response to Sears' Motion, when addressing the issue of the termination, Ms. Plain has alleged that this termination was yet another example of abuse by her employer. It is harassment based on her disability. (App. 87) Additionally, it is alluded to that she was being forced to resign and/or be terminated (App. 120-124). This termination is

another example of Sears' harassment towards her and should be read in conjunction with the other allegations she made concerning Sears' harassment of her. It is reasonably related to not only her 1992 and 1993 communications to the EEOC but also the actual charge filed with the EEOC.[1]

It is well established that acts occurring after the filing of an administrative complaint may be presented at trial without the necessity for additional administrative charges being filed if they are similar in nature or are related to the allegations raised by the EEOC charge. *See*, *Butts v. City Department of Houston*, 990 F.2d 1397 (2nd Cir. 1993); *Waiters v. Parsons*, 729 F.2d 233 (3rd Cir. 1984); *Gupta v. East Texas State University*, 654 F.2d 411, 413-14 (5th Cir. 1981); *Gamble v. Birmingham Southern Railway*, 514 F.2d 678, 689-90 (5th Cir. 1975); *Hughes v. Derwinski*, 967 F.2d 1168 (7th Cir. 1992); *Oubichon v. North American Rockwell Corp.*, 482 F.2d 569, 571 (9th Cir. 1973); *Chung v. Pomona Valley Community Hospital*, 667 F.2d 788 (9th Cir. 1982); *Wyrick v. TWA Credit Union*, 804 F.Supp. 1176 (W.D. Mo. 1992). Ms. Plain contends that the act of forcing her termination resulted from a failure to accommodate her disability. This contention is similar in nature to the allegations raised by the EEOC charge in that it alleges the same basis (and issue) as the one filed with the EEOC. In addition, it is a consequence that arguably flows from the longstanding policy

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[1]Ms. Plain alleges that she has filed charges with the EEOC prior to the one that Sears calls a "singular" EEOC charge. In the argument below, these are more fully set forth in support of Ms. Plain's argument that she filed timely EEO charges.

of harassing Ms. Plain because of her disability and/or sex. Ms. Plain has properly raised this issue in her responses. To force Ms. Plain to file new charges with the EEOC in order to allow the termination issue to be considered, erects a "needless procedural barrier." *Gamble v. Birmingham Southern Railway Co.*, 514 F.2d 678, 689 n.6 (5th Cir. 1975); *accord Daines v. City of Mankato*, 754 F.Supp. 681 (D. Minn. 1990). To dismiss her *pro se* complaint on this basis is patently pharisaic.

II. THE COURT BELOW ERRED WHEN IT ADOPTED SEARS' REASONING AND RULED THAT MS. PLAIN DID NOT FILE A TIMELY ADMINISTRATIVE CHARGE OF DISCRIMINATION CHALLENGING THE ALLEGED DENIALS OF ACCOMMODATION, HARASSMENT AND PROMOTION.

In adopting wholesale Sears' arguments in its motion to dismiss, the Court below also ruled that Ms. Plain's charges to the EEOC were untimely. In applying the narrow reasoning offered up by Sears on this issue, the Court below has erred for several reasons: there is evidence to support Ms. Plain's contention that she did timely file, this is a disputed issue of fact that renders summary judgment inappropriate, there was an ongoing pattern of abuse which can be timely alleged at any time during the pattern and finally, the EEOC itself did not dismiss Ms. Plain's for untimeliness, a legal fact not addressed in the administrative processing of the charge (although an option on its notice of Right To Sue) and thus waived by Sears prior to their raising it as part of the Motion to Dismiss.

Ms. Plain did initiate charges with the EEOC in a timely fashion on these allegations. Ms. Plain alleges that, on 25 July 1992, she made contact with U. S. Department of Justice (Civil Rights Division) concerning the fact that she believed that she was being discriminated against at Sears because of her disabilities. (App. 100) This is not specifically

addressed in Sears' reply to Ms. Plain's Opposition to its Motion To Dismiss. This is a fact that directly contradicts the assertions that the only EEOC contact that Ms. Plain made was with the charge dated 9 January 1995. Further, Ms. Plain was assured by the U. S. Department of Justice that her correspondence was being forwarded to the U. S. EEOC for disposition. (App. 100) Again, this was not specifically addressed in Sears' reply to Ms. Plain's Opposition to its Motion To Dismiss. After this communication from the Department of Justice, Ms. Plain heard nothing from the EEOC.

On 14 August 1993, Ms. Plain sent another letter, this time addressed to Christopher Bell the Acting Associate Legal Counsel/ADA Services - EEOC, explaining her situation and asked specific questions concerning her rights as a disabled employee. (App. 100) Ms. Plain received a written response from Ms. Peggy R. Mastroianni/Assistant Legal Counsel/ADA Policy Division indicating that Ms. Plain should contact the Charlotte District Office if she believed that she was discriminated against. (App. 100) These statements were made in her submissions to the EEOC. These facts were not denied by Sears nor were they specifically addressed by the Courts below. The letters on record with the EEOC, from Ms. Plain's having written to the Department of Justice and the EEOC's ADA Services could be also be construed as being charges. Discovery could glean these records from the Agency and prove the point, but because the Courts below did not view this as an issue of fact and instead summarily rejected the case, no chance was given for the discovery process to yield the truth.

In *Stallworth v. Monsanto*, 13 FEP 826 (N.D.Fla. 1975), the charge of discrimination was not filed with the EEOC by the charging party but only fortuitously found its way to the EEOC after being filed with the vice-president of the United States. In that case, the submission was considered to be a "charge of discrimination." A charge of discrimination need not be sworn within the statutory period. *Weeks v. Southern*

Bell Tel. & Tel. Co., 408 F.2d 228 (5th Cir. 1969); *Choate v. Caterpillar Tractor Co.*, 402 F.2d 357 (7th Cir. 1968); *Russell v. American Tobacco Co.*, 528 F.2d 357 (4th Cir. 1975). In *Price v. Southwestern Bell Tel.Co.*, 687 F.2d 74 (5th Cir. 1982) the Court, specifically addressing 29 C.F.R. Section 1601.12(b)(1992), stated that a liberal policy of amendment is consistent with the remedial purpose underlying Title VII." *Id.*, at 77-78 n. 3. There the Court stated that it was important to take into account the "principal function of the administrative charge; the provision of an adequate factual basis for the Commission's initiation of the investigatory and conciliatory procedures contemplated by Title VII." 687 F.2d at 78. In the instant case, Sears alleged that Ms. Plain failed to make contact with the EEOC in a timely fashion. Ms. Plain directly contradicted this assertion in her response to the Motion To Dismiss. Whether Ms. Plain made timely contact is a question of fact that goes to the very heart of this matter. Clearly, there were multiple attempts at various times from 1992 through 1995 by this *pro se* litigant to secure some type of response from the EEOC or her employer on her stated issues, yet despite the legal requirement to view the facts most favorably to the non-moving party, Ms. Plain, these attempts were completely ignored by the Courts below.

Suit alleging discrimination based on sex or disability may only be brought when there is a timely filing of a charge of discrimination and the timely filing of suit after a notice of right-to-sue. If, however, a systemic violation has not abated, suit may be brought even if there is no specific discriminatory act reflective of the systemic violation within the requisite time frame. *See generally*, *Reed v. Lockheed Aircraft Corporation*, 613 F.2d 757 (9th Cir. 1980). In the *Reed* case, the charging party alleged discrimination in promotions that occurred in 1963, 1969 and 1972. The charging party did not file a charge until 1972, at least four (4) years after the last alleged discriminatory incident. The charging party was permitted to pursue her case because she was alleged to have attacked the

promotion systems as a whole. In a suit alleging a systemic violation, "it is the ongoing program of discrimination, rather than any of its particular manifestations, that is the subject of attack." *Id.*, at 762. In the instant case, Ms. Plain has raised through her pleadings and charges the issue of Sears' policy of treating the disabled employees in a disrespectful fashion and a system wide failure to accommodate its disabled employees. (App. 121) Additionally, Ms. Plain has raised specific issues of disrespectful treatment specifically directed at her in her pleadings, some of which include actions and statements made to her as a result of her disability. (App. 9, 21) Ms. Plain's submissions read in the light most favorable to her lays out a firm factual foundation for her allegation of a systemic violation. Sears' employees failed to place Ms. Plain on the staff schedule because her disability made her work schedule inflexible and her health was poor. In addition, Sears' manager admitted that they had said that if she could not work a regular schedule, he did not know what he could do for Ms. Plain. (App. 9, 90) He demanded work releases from her doctor so that he could place her on a regular work schedule knowing that she could not get the releases. (App. 91) Ms. Plain challenges Sears' contention that it failed to advance her in her career due to her health rather than Sears' inability to accommodate her disability. The policy that Ms. Plain is attacking is the treatment of its disabled employees. In her letter to Sears, she requested why individuals with disabilities as a whole, herself included, had not been treated more respectfully. (App. 120) This is attacking a system-wide violation of the ADA. As such, Ms. Plain has raised an issue that falls within the time frame set forth by the EEOC regulation, specifically an ongoing pattern of discrimination which is a systemic violation of both Title VII and the ADA. At the very least her Response to Sears' Motion supplements her complaint and EEOC charge. The EEOC regulations contemplate allowing amendments to the original charge of discrimination that allege "additional acts...related to or

growing out of the subject matter of the original charge" and state that these amendments will be deemed to "relate back to the date the charge was first received." 29 C.F.R. Section 1601.12(b)(1992). Ms. Plain submitted a statement in support of her allegations that should reflect back to the date that the charge was first received and therefore should be read in conjunction with her original charge of discrimination. This statement was a supplemental affidavit to her charge and raises the issues of a systemic violation. A charge of discrimination is adequate if it contains "a written statement sufficiently precise to identify the parties, and to describe generally the actions or practices complained of." 29 C.F.R. Section 1601.12(b)(1992). The charge may be amended "to cure technical defects or omissions, including failure to verify the charge, or to clarify or amplify allegations made therein." *Id.*

According to Section 605.1 of the EEOC's Compliance Manual, "[t]he issue of whether the Commission has jurisdiction over a charge must be addressed initially in every case at the intake stage of the investigation." Further, "[a] determination on the jurisdictional issue will be made before a determination on the merits of the charge is made; ..." *Id.* Sears claims that Ms. Plain, a *pro se* litigant to both the EEOC and the District Court, is untimely in filing her charge with the EEOC. It is important to note that, although given the opportunity to do so, the EEOC chose not to dismiss Ms. Plain's charge for untimeliness, but rather on the merits. (App. 95) Further, the record is not clear as to whether or not Sears made any objection to the untimeliness of the filing of the charge of discrimination at the EEOC-level. Timeliness is an inquiry that goes to the very heart of jurisdiction. Ms. Plain was prevented from engaging in any discovery due to the granting of Sears' Motion To Dismiss. (App. 86-87) To the best of her knowledge and belief, Sears did not object to the jurisdiction of the discrimination allegations at the EEOC level and the EEOC did not dismiss the charge for untimeliness. Had discovery been conducted, perhaps there would be some

further ability for this Court to evaluate this issue. Sears did not state whether or not it challenged the jurisdiction of the EEOC at the EEOC-level in its Motion. Ms. Plain raised this issue in her Response to Sears' Motion To Dismiss. However, this issue was not addressed by the court below.

III. THE COURT BELOW ERRED WHEN IT ADOPTED SEARS' REASONING AND RULED THAT MS. PLAIN WAS NOT A QUALIFIED INDIVIDUAL WITH A DISABILITY UNDER THE AMERICANS WITH DISABILITIES ACT.

The Court below reasoned that because Ms. Plain was found to be 100% disabled as of January 6, 1994, she does not fall within the protection of the ADA as it pertains to her charges of discrimination. Ms. Plain's charges raise allegations that span a period of time, specifically the allegation of harassment based on her disability and sex and the systematic harassment of disabled employees. Ms. Plain, having been forced out of gainful employment due to her disability, had no other choice but to apply for and secure some means of income after she continued to suffer the effects of the harassment and discrimination. As of January 6, 1994, Ms. Plain's medical doctors certified that she was 100% disabled because of the severity of her multiple sclerosis. The allegations of harassment and discrimination that pre-date this certification are justiciable as they present a real case in controversy over the issues of failure to promote, harassment and failure to accommodate. Further, in Ms. Plain's response, she refuted the allegation that she did not fall within the protection of the ADA: she had worked at Sears for a number of years with and without accommodation even with her disability. (App. 88) She was thus a qualified individual with a disability. The discrimination occurred when she began to request accommodation in the form of a flexible working schedule rather than a regular rigid work schedule. Her sex began to be

an issue with the comments that she was the first woman to work in lawn and garden. (App. 9) She alleges that she was not given an opportunity or reasonably accommodated to work in other positions at Sears. (App. 9) She alleges that she was ridiculed and made fun of by others at work. (App. 9) At the time the discriminatory incidents that form the basis for her complaint arose up until the time that she left employment, Ms. Plain was capable of performing the essential functions of her position with accommodation. Ms. Plain contended in her Response to Sears' Motion To Dismiss that she was a qualified handicapped employee within the meaning of the ADA. Sears does not dispute these allegations pertaining to any actions that pre-date January 6, 1994. The Court below erred when it summarily dismissed these factual contentions.

CONCLUSION

Ms. Plain's case is a worthy one for a grant of certiorari. Review of this case is crucial becuase it strikes at the heart of our adversarial system of justice: do we entitle a *pro se* litigant the ability to proceed to a full and fair hearing on her systemic claims of discrimination after an opportunity for discovery to disclose the truth and do we entitle a pro se litigant to prove up disability discrimination for acts that occurred prior to her totally disabling impairments. This case provides an excellent opportunity to further define the parameters of EEOC charges in terms of timing and substance.

Respectfully submitted
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